Santa Clara Law Review

Volume 20 | Number 2 Article 5

1-1-1980

Reconciling Media Access with Confidentiality for the Individual in Juvenile Court

Susan D. Cohen

RECONCILING MEDIA ACCESS WITH CONFIDENTIALITY FOR THE INDIVIDUAL IN JUVENILE COURT

Susan D. Cohen*

INTRODUCTION

Media access to juvenile court proceedings evokes potential conflicts among three separate values—the first amendment right of freedom of the press, the tradition of confidential juvenile court proceedings, and the public's right to know what goes on in its courts of justice.[1] This article will review the progression of these countervailing values to their present-day expression in recent cases, most notably the California Supreme Court's broad holding in *Brian W. v. Superior Court*,[2] and the United States Supreme Court's reaffirmation of constitutional guarantees for a free press in *Oklahoma Publishing Co. v. District Court*.[3] Use of a contract to protect

* The author is presently Legal Writing Instructor, University of Puget Sound School of Law. B.A., 1975, Northwestern University; J.D., 1979, University of Santa Clara School of Law.

1. To date, a minor has no sixth amendment right to a public trial. *In re* Gault, 387 U.S. 1 (1967) held that the due process clause of the United States Constitution was applicable to juvenile delinquency proceedings, but delineated only those protections mandated by the Constitution. *Gault* held that in juvenile proceedings due process requires: timely, written notice to the minor and his parents or guardian of the specific allegations against the minor; the right of the minor and parents or guardian to be advised of his right to counsel; appointment of counsel if the defendant is unable to afford one; application of the right against self-incrimination; and the rights of confrontation and cross-examination of witnesses.

Since *Gault*, the United States Supreme Court has ruled that a minor in a delinquency hearing has the right to have the allegations against him proved beyond a reasonable doubt, *In re* Winship, 397 U.S. 358 (1970), but has no constitutional right to a trial by jury. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). The Court has not confronted the issue of a right to a public trial in juvenile court.

2. 20 Cal. 3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978), where a minor sought to exclude media representatives from his fitness hearing in juvenile court. The supreme court held that press representatives had a legitimate interest in the hearings and could be allowed to hear those proceedings.

3. 430 U.S. 308 (1977). The District Court of Oklahoma County enjoined members of the press from disseminating the name or picture of a minor, "L.B.," on whom charges alleging delinquency by second degree murder had been filed. The Oklahoma

juveniles from the public dissemination of their identities will be proposed as an alternative to the present system, where proceedings are either totally inaccessible, or open to a limited public with an accompanying risk that names will be revealed.

THE JUVENILE COURT MOVEMENT IN AMERICA

Progress toward a judicial system specifically geared to dealing with, and reforming, youthful offenders, while at the same time providing them with basic due process protections, has been slow and erratic at best. Before such a relatively sophisticated goal could even be formulated, it was necessary to gain some measure of public acceptance for the concept that children who break the law should be treated differently from adults. The first stage in reformed justice for juveniles thus took the form of separating them from adult criminals. An 1824 charter for establishing the House of Refuge in New York City to provide food, shelter, and education to homeless and destitute children,[4] was one manifestation of this attitude. Juveniles were segregated in a rehabilitative, informal atmosphere, in an attempt to deter delinquency. The Chicago Reform School developed a family life approach to the problem of juvenile corrections that consisted of establishing small living groups to approximate natural conditions.[5] This innovation of the 1850's succeeded in popularizing the use of foster homes to treat juvenile offenders.[6]

By 1870, the notion of reform began to spread to the courts. The Illinois Supreme Court advocated extension of procedural guarantees to minors, particularly in "grave and heinous" offenses.[7] These procedures included notice of the

---

Supreme Court upheld the lower court's order. Oklahoma Publishing Co. v. District Court, 555 P.2d 1286 (1976). The United States Supreme Court reversed on the basis that the information—the juvenile's name and the allegations against him—was obtained lawfully and that no objection was made to the courtroom presence of the press, citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 568 (1975): " 'Once a public hearing had been held, what transpired there could not be subject to prior restraint.' " 430 U.S. at 311.

4. Act of Mar. 29, 1824, ch. 126, § 4, 1824 N.Y. Laws 111.

5. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1208 (1970).

6. FOURTH ANNUAL REPORT OF THE OFFICERS OF THE CHICAGO REFORM SCHOOL TO THE BOARD OF GUARDIANS 55 (1859), *cited in* Fox, *supra* note 5, at 1209 n.108.

7. People *ex rel* O'Connell v. Turner, 55 Ill. 280, 287, 8 Am.R. 645, 651 (1870),

nature of allegations, and a speedy public trial by an impartial jury.[8] It was also in Illinois that the nation's first juvenile court law was enacted.[9] Although the 1889 Act emphasized procedural guarantees, the protections of adult criminal procedural law were generally rejected. Nevertheless, the notion of separate courts quickly became popular and all but two states passed juvenile court laws by 1925.[10] Today, all fifty states and the District of Columbia have adopted a system of juvenile court jurisdiction separate from adult criminal jurisdiction.[11]

The constitutionality of certain aspects of the juvenile courts was reexamined in 1966, when due process of law was extended to juvenile court proceedings by the Supreme Court's *In re Gault* decision.[12] For the first time the Court addressed the need for constitutional protections for the minor where there was a danger of loss of liberty. The Court was concerned with preserving the hard-won privileges of the juvenile court, such as separating juvenile and adult offenders, avoiding "criminal" classifications, and maintaining confidentiality of proceedings and records. But it took another significant step by admitting that, since juvenile "rehabilitation" may differ little from adult punishment, there was a need for more basic protections. This attitude was summed up in Justice Fortas' statement, "[T]he condition of being a boy does not justify a kangaroo court."[13] However, the Court's *Kent v. United States*[14] holding, that the requirement in juvenile court of "the essentials of due process and fair treatment,"[15]

---

cited in Fox, *supra* note 5, at 1213 n.132.

8. Fox, *supra* note 5, at 1213 n.132.

9. Act of Apr. 21, 1899, 1899 Ill. Laws 131.

10. Geis, *Publicity and Juvenile Court Proceedings*, 30 ROCKY MTN. L. REV. 101, 105 (1958). Wyoming and Maine had no juvenile court legislation. *Id.* Separate courts for juveniles proliferated as it became clear that they were constitutional. In 1908, the Idaho Supreme Court noted that:

> These questions [the nature of the proceedings, either civil or criminal, and the purpose of the proceedings, either rehabilitative or punitive] have all been so extensively, exhaustively and lucidly considered and discussed by so many courts within recent years that we shall content ourselves with a citation of some of the authorities . . . .

In re Sharp, 15 Idaho 120, 126, 96 P. 563, 564 (1908).

11. *See In re* Gault, 387 U.S. 1, 14 (1967).

12. *Id.*

13. *Id.* at 28.

14. 383 U.S. 541 (1966).

15. *Id.* at 562.

was clarified to exclude the interpretation that a juvenile hearing must conform to all the requirements of an adult criminal trial.[16] Thus, in most respects, the traditional description of the juvenile court ironically remained intact.

Since the decision in *Gault,* the Court has been asked on several occasions to specify the requirements of "the essentials of due process and fair treatment." Its response has been to establish the burden of proof in delinquency cases as "beyond a reasonable doubt,"[17] to deny a constitutional right to a trial by jury to juveniles,[18] and, to apply the double jeopardy clause of the fifth amendment to juvenile proceedings.[19] To date, however, the Court has avoided the major issues of the right to a public trial[20] and the concomitant right of news media access to juvenile proceedings.[21]

The fact that juveniles are denied the full spectrum of rights granted to adult defendants makes it even more important that their day in court receives some measure of public scrutiny. Media representatives are willing to facilitate such public scrutiny and should be encouraged to do so. Some com-

---

16. 387 U.S. at 30.

17. *In re* Winship, 397 U.S. 358 (1970).

18. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

19. Breed v. Jones, 421 U.S. 519 (1975).

20. *See, e.g., In re* Gault, 387 U.S. at 21-25, which discusses the validity of maintaining confidentiality of records and notes that other features of "unique benefit will not be impaired by constitutional domestication." *Id.* at 22.

McKeiver v. Pennsylvania, 403 U.S. at 555, discusses due process in juvenile courts, and determines there is no constitutional right to a jury trial.

> The availability of trial by jury allows an accused to protect himself against possible oppression by what is in essence an appeal to the community conscience, as embodied in the jury that hears his case. To some extent, however, a similar protection may be obtained when an accused may in essence appeal to the community at large, by focusing public attention upon the facts of his trial, exposing improper judicial behavior to public view, and obtaining, if necessary, executive redress through the medium of public indignation. Of course, the Constitution, in the context of adult criminal trials, has rejected the notion that public trial is an adequate substitute for trial by jury in serious cases. But in the context of juvenile delinquency proceedings, I cannot say that it is beyond the competence of a State to conclude that juveniles who fear that delinquency proceedings will mask judicial oppression may obtain adequate protection by focusing community attention upon the trial of their cases.

Id. at 554-55 (Brennan, J., concurring and dissenting). It seems that in at least one Justice's eye, the notion of a public trial is considered *among the factors* in determining whether a juvenile hearing has complied with the requirements of due process.

21. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 n.26 (1975).

promise must be found, however, between affording minors this protection without stripping them of their right to keep their individual identities secret.

It is conceivable that confidentiality is the juvenile offender's greatest safeguard, for without it, the minor might as well be placed squarely in the criminal justice system. Without confidentiality the juvenile would suffer many of the disabilities that attach to adult criminals: stigmatization, prejudice in seeking employment, and difficulties in obtaining further education. Although originally confidentiality was not guaranteed,[22] it has grown to be a hallmark, and is often the sole justification for court procedures.[23] While it has not enjoyed the status of being a constitutional guarantee, it has had the support of the United States Supreme Court.[24]

There are basically two types of confidentiality spoken of in reference to juvenile law: juvenile record sealing or expungement, and the private nature of the juvenile court proceedings themselves.[25] Frequently, there are statutory provisions regarding the confidentiality and/or sealing of juvenile records.[26] Most states have statutes regulating access to juvenile proceedings,[27] and while in most jurisdictions the media

---

22. Fox, *supra* note 5, 1213.

23. *See In re* Gault, 387 U.S. at 14-31.

24. *See id.* at 24-25.

25. *See, e.g.*, CAL. WELF. & INST. CODE §§ 389, 781 (West Supp. 1980)(regarding record sealing); *id.* § 346 (regarding the closed nature of the hearings).

26. *See, e.g.*, ALA. CODE § 12-15-101 (1977); ALASKA STAT. § 47.10.090 (1979); CAL. WELF. & INST. CODE §§ 389, 781 (West Supp. 1980); FLA. STAT. ANN. § 39.12(3) (West 1974); GA. CODE ANN. §§ 24A-3501 to 3504 (1976 & Supp. 1979); IDAHO CODE § 16-1816 (1979); IND. CODE § 31-6-8-1 to 2 (Supp. 1979); LA. REV. STAT. ANN. § 13:1586 (West 1968); MONT. REV. CODES ANN. § 10-1230 (Supp. 1977); N.M. STAT. ANN. § 32-1-45 (1978); OKLA. STAT. ANN. tit. 10, § 1125 (West Supp. 1979); S.D. CODIFIED LAWS ANN. § 26-8-33 (1977). *But cf.* MISS. CODE ANN. § 43-21-19 (1973) (records of first offenders are made available to state agencies only; subsequent encounters with the juvenile justice system are made public).

The Standards Relating to Juvenile Records and Information Systems Part XV § 15.1A recommend that juvenile records not be made available to the public. JUVENILE JUSTICE STANDARDS PROJECT, IJA-ABA, STANDARDS RELATING TO JUVENILE RECORDS AND INFORMATION SYSTEMS 25 (Tent. draft 1977). Part XVII § 17.1 recommends destruction of all unnecessary information contained in the juvenile's record. *Id.* at 28.

27. *See, e.g.*, ALA. CODE § 12-15-65 (1977); ALASKA STAT. 47.10.070 (1979); ARK. STAT. ANN. § 45-442 (1977); CAL. WELF. & INST. CODE § 346 (West Supp. 1980); GA. CODE ANN. § 24A-1801 (1976); IDAHO CODE § 16-1813 (1979); MISS. CODE ANN. § 43-21-17 (Supp. 1978); MONT. REV. CODES ANN. § 10-1221 (Supp. 1977); N.M. STAT. ANN. § 32-1-31.B (1978)(public excluded, but media can be present if there is no publication of the identity of the child or family); OKLA. STAT. ANN. tit. 10, § 1111 (West Supp. 1979); S.D. CODIFIED LAWS ANN. § 26-8-32 (1977)(public hearing unless a pri-

may be granted access to hearings, publication of delinquents' names is prohibited.[28] Unfortunately, although it is often the case that media reporters are permitted in the courtroom with the understanding that the juvenile offender's name will not be publicly disclosed, frequently there is such a subsequent disclosure.[29] Judges rely on press guidelines[30] and understandings between the judge and reporter, but it was this sort of reliance, as discussed below, that led to problems in *Oklahoma Publishing Co. v. District Court*.[31]

What can amount to grave harm to a juvenile—dissemination of information identifying him with delinquent behavior—should not be left to the discretion of a juvenile court judge or referee, or to a casual understanding between the judge and the reporter. The purpose of the juvenile court is treatment and rehabilitation—publicity is tantamout to punishment. Whatever deterrent value publication of a juvenile offender's identity may have,[32] it is grossly outweighed by the potential harms.

FREEDOM OF THE PRESS AND THE RIGHT OF ACCESS

A summary of the scope and nature of the first amend-

---

vate hearing is requested). *But cf.* FLA. STAT. ANN. § 39.09 (West Supp. 1979)(hearings are open unless the judge determines closure would best serve the public interest and the welfare of the child); IND. CODE § 31-6-7-10(b) (1979)(hearings are public, but may be closed in the discretion of the trial court).

28. *See, e.g.*, ALA. CODE § 12-15-65 (1977); ARK. STAT. ANN. § 45-443 (1977); GA. CODE ANN. § 24A-3503(g) (1976); MONT. REV. CODES ANN. § 10-1241 (Supp. 1977); N.M. STAT. ANN. § 32-1-31.B (1978); S.D. CODIFIED LAWS ANN. § 26-8-34 (1977). *Contra*, MISS. CODE ANN. § 43-21-19 (1973)(requires, except for first offenders, the publication of the identification of the minor and parents "in a newspaper having a general circulation" in the county of the child's residence).

29. *See* Comment, *The Press and Juvenile Delinquency Hearings: A Contextual Analysis of the Unrefined First Amendment Right of Access*, 39 U. PITT. L. REV. 121, 127 n.31 (1977).

30. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 613-17 (1976)(Brennan, J., concurring).

31. 430 U.S. 308 (1977).

32. *See, e.g.*, MISS. CODE ANN. § 43-21-19 (1973); statement of the late J. Edgar Hoover, Chief of the F.B.I., *cited in* Geis, *supra* note 10, at 120.

> Publicizing of names as well as crimes for public scrutiny, releases of past records to appropriate law enforcement officials, and fingerprinting for future identification are all necessary procedures in the war on flagrant violators, regardless of age. Local police and citizens have a right to know the identities of the potential threats to public order within their communities. (Footnote omitted.)

Id.

ment right to freedom of the press is relevant to an understanding of how it conflicts with the notion of confidentiality in the juvenile court. At the outset, it should be noted that the usual argument leveled against the press—that pretrial publicity is potentially damaging to the presentation of the defendant's case—is not at issue in this article. The dissemination that would identify the minor or his family should be prohibited *for the sake of preserving confidentiality.* This could be accomplished by using the sanction of contempt, although that remedy is generally reserved for instances where the right to a fair trial is in jeopardy.[33] Denying the press any access to juvenile proceedings[34] would have the unfortunate side effect of closing those proceedings off from public scrutiny. Thus, the right of press access to the juvenile court really hinges on whether there is a right of *public* access.

Although initial "right of access" cases did not extend constitutional protections to news *gathering,*[35] that activity is now part of the protected first amendment right.[36] In reality, this protection may amount to less than it seems. Reporters can be thwarted when confidential sources realize that disclosure to the press can result in their identification by state or

---

33. The AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Proposed Final Draft, Dec. 1967) recommends the limited use of the contempt power against persons who disseminate information publicly so as to jeopardize a criminal defendant's right to a fair trial, or against a person who knowingly violates a valid judicial order not to disseminate such information, or information obtained in a closed pretrial hearing, or hearings outside the presence of a jury (in a jury trial). For those jurisdictions which restrict access to juvenile proceedings, the Standards Relating to Fair Trial and Free Press might be extended to warrant the contempt remedy for publication of a minor's identification because of the closed nature of the hearings. Even if the Standards could be stretched far enough to encompass closed juvenile hearings, they presently provide no protection unless enacted as law.

34. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 n.26 (1975); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

35. Zemel v. Rusk, 381 U.S. 1 (1965), dealt with the question of whether the Secretary of State is statutorily authorized to refuse to validate the passports of United States citizens for travel to Cuba. The appellant argued that the refusal to validate his passport denied him some right protected by the first amendment to travel and gather information. The Court held that no such first amendment right to gather information existed. *Id.* at 16.

36. Branzburg v. Hayes, 408 U.S. 665 (1972). "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. The Court determined that although the gathering of news was constitutionally protected, no constitutional protection exists which would render reporters immune from grand jury subpoenas requesting disclosure of sources.

federal authorities. Furthermore, a review of Supreme Court cases reveals that the first amendment does not guarantee the press a right of special access to information not generally available to the public,[37] nor the unreserved right to keep its sources secret.

One of the first cases to deal with this issue, *Branzburg v. Hayes*[38] does not directly address the issue of what constitutes an infringement on the press' right of access, but may indicate that courts should balance the state's interest in law enforcement against the burden placed on news functions when the press is deprived of access or required to reveal its sources.

> On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is sufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put them in the course of a valid grand jury investigation or criminal trial.[39]

One commentator suggests the balancing test is the proper approach;[40] however, the balancing of the interest in news gathering and confidentiality of sources against the state's interest in effective law enforcement does not appear to be absolutely required by the Court in subsequent media access cases.

Houchins v. KQED, Inc.,[41] *Saxbe v. Washington Post Co.*,[42] and *Pell v. Procunier*[43] are cases dealing with the right of media access to prisoners in both state and federal prisons.[44] Although in all instances the Court noted that the poli-

---

37. *Id.* at 684; Houchins v. KQED, Inc., 438 U.S. 1 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974). *Houchins*, *Saxbe*, and *Pell* involved the rights of media access to prisons. The Supreme Court has never intimated a first amendment guarantee of "a right of access to government information or sources of information within the government's control." 438 U.S. at 15.

38. 408 U.S. 665 (1972).

39. *Id.* at 690-91.

40. Comment, *supra* note 29, at 129.

41. 438 U.S. 1 (1978).

42. 417 U.S. 843 (1974).

43. 417 U.S. 817 (1974).

44. *Houchins* involved a question of media access to a county jail. The press asserted a right of access to government information or sources of information within the government's control. The Court held that the media had no right of access

cies underlying the prohibition on media access to prisons was not part of an attempt by authorities to conceal prison conditions,[45] the Court made no effort to balance the public's right to know about a particular prisoner's plight against the authorities' right to maintain effective law enforcement. Members of the press are entitled to the same access to prisons as the general public.[46] Perhaps the Court acknowledged that a balancing test was raised in *Branzburg*, for it stated in *Saxbe*:

> In this case, however, it is unnecessary to engage in any delicate balancing of such penal considerations against the legitimate demands of the First Amendment. . . . In this regard, the Bureau of Prisons [sic] visitation policy does not place the press in any less advantageous position than the public generally.[47]

The news media has traditionally had a right of access to the courts of this country; the juvenile courts have been the notable exception. Presently, many juvenile courts admit persons with a legitimate purpose for being there. The press, as a representative of the public's concerns and as a watchdog of the judicial process, has a legitimate interest in the juvenile court system.[48] The news media should be granted access in

---

greater than that of the public. 438 U.S. at 15. *Pell* involved the constitutionality of section 415.071 of the California Department of Corrections Manual which provides that "[p]ress and other media interviews with specific individual inmates will not be permitted." 417 U.S. at 819. *Saxbe* addressed the constitutionality of paragraph 4b(6) of Policy Statement 1220.1A of the Federal Bureau of Prisons. The court noted the language of the paragraph as follows:

> Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.

417 U.S. at 844 n.1.

45. 438 U.S. at 13-15; 417 U.S. at 848; 417 U.S. at 830.

46. 417 U.S. at 849; 417 U.S. at 830-31. The standards of access in the California and federal prisons may differ somewhat, but they are basically similar. The California prisons permit public access by means of tours conducted by the Department of Corrections. The general rule in federal prisons is that no one may enter a prison and designate a prisoner whom (s)he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or a friend of the particular inmate.

47. 417 U.S. at 849.

48. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1975).

> The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers.

the same manner as any member of the public would be granted access to fulfill some legitimate concern or purpose.[49] It is important to distinguish this legitimate interest—knowledge of the process—from the juvenile defendant's interest in nondisclosure of his identity.[50]

Freedom to Publish

Prior restraint on speech and publication is a serious and highly disfavored infringement on first amendment rights. While the possibility of criminal or civil liability after publication, for example in cases of defamation, may somewhat impede publication, a prior restraint prohibits publication altogether. A prior restraint, therefore, is viewed by the courts with a "heavy presumption" against its constitutional validity.[51] As Justice Brennan stated in *Nebraska Press Association v. Stuart*,[52] the system of prior restraints " 'allows less opportunity for public appraisal and criticism.' "[53]

Injunctions restraining the news media from publishing lawfully obtained information are generally disfavored. Yet, two categories of exceptions remain: 1) where a criminal defendant's right to a fair trial may be impaired although all possible safeguards have been exhausted;[54] and, 2) when the nation's security is at stake.[55]

Id. at 560.

49. This assumes a statutory provision or practice whereby persons not directly involved in the juvenile proceedings are admitted to the proceedings. A means to protect a minor's identity should be used to enable the news media to observe the judicial proceedings and perform its watchdog function without risking disclosure of the minor's identification.

50. Support exists for the public's right to a public (adult) trial. *See, e.g.*, United States v. Kobli, 172 F.2d 919, 924 (3d Cir. 1949); Davis v. United States, 247 F. 394, 395-96 (8th Cir. 1917); Kiritowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 103 (1956).

51. Historically, there has been a presumption against the constitutionality of prior restraints on the press. Three exceptions developed during the twentieth century. Prior restraints might be constitutional where: 1) the speech might have an adverse effect on the conduct of war, Schenck v. United States, 249 U.S. 47 (1919); 2) the speech might incite a riot or advocate the violent overthrow of the government, amounting to a breach of the peace, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); and 3) the speech amounts to an "obscene" publication, Roth v. United States, 354 U.S. 476 (1957).

52. 427 U.S. 539 (1976).

53. *Id.* at 589-90 (quoting T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970)).

54. *Id.* at 569-70.

55. *Id.* at 590-91 (Brennan, J., concurring).

The first category of exceptions noted above has bearing on the issue of providing confidential proceedings for minors. Cases in that area indicate that the Supreme Court's attitude toward press access hinges on whether or not there has been *public* access to the courtroom. For example, in *Nebraska Press Association,* the Court reversed a Nebraska court's restraint on damaging pretrial publicity in a mass-murder case.[56] Following a detailed balancing of the harms,[57] the Court noted that there was nothing prohibiting the press from reporting events that transpired at a public court proceeding.[58]

The public access justification for press coverage was extended to a situation involving a juvenile in *Oklahoma Publishing Co. v. District Court.*[59] In 1976, an eleven-year-old boy, "L.B.," was charged by the juvenile authorities of the State of Oklahoma with delinquency by second degree murder. The minor was arraigned at a "closed" hearing at which the judge entered a pretrial order enjoining members of the news media from "publishing, broadcasting, or disseminating, in any manner, the name or picture of [the] minor child."[60]

---

56. State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975). Simants was arrested and arraigned for the murders of six members of a family found murdered in their home. The mass killings in the small rural community of Sutherland, Nebraska, attracted widespread news coverage both locally and nationally. The Nebraska court feared that publicity surrounding the crime jeopardized the defendant's right to be tried by an impartial jury, and upheld (but modified) the lower court's restraining order. The United States Supreme Court reversed the Nebraska court's ruling on the ground that the criminal defendant, Simants, had not met the heavy burden imposed to secure a prior restraint. 427 U.S. at 543-44.

57. The Court used a balancing test to determine the legality of the pretrial restraining order: whether " 'the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger,' " *Id.* at 562, (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd* 341 U.S. 494, 562 (1951)).

The Court noted pretrial publicity does not necessarily lead to an unfair trial, and within legal confines, the judge must take precautions to mitigate the effects of pretrial publicity. 427 U.S. at 554-55. The Court suggested the three-prong guidelines set forth in Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966): the judge should continue the case until the threat of prejudice abates, transfer the case to a county in which the pretrial publicity has not been prejudicial, or sequester the jury. Where the matter at issue is the impaneling of an impartial jury, sequestration is not a viable means of ensuring a defendant's constitutional rights. 427 U.S. at 562.

58. *Id.* at 568.

59. 430 U.S. 308 (1977).

60. *Id.* It is interesting to note that the United States Supreme Court published the minor's full name. Although in this particular case the issue may be moot, publication of the minor's full name or last name only does not further the confidential

Oklahoma law provided that a juvenile "hearing shall be private unless specifically ordered by the judge to be conducted in public, but persons having a direct interest in the case shall be admitted."[61]

The United States Supreme Court did not address the constitutionality of the Oklahoma statute, but rather, relied upon *Cox Broadcasting Corp. v. Cohn*[62] and held that, as the hearing had *in fact been open to the public,* the state court could not restrain publication of events occurring at such a hearing.[63]

The distinction between a public or private hearing was compelled as a result of decisions in *Cox, Houchins, Pell,* and *Saxbe.*[64] *Cox* held that no sanctions could be imposed for the publication of the name of a rape victim that had been revealed in connection with the prosecution of a crime. As long as the public had access to such proceedings, the media could not be excluded or restrained from disseminating information obtained:

> If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. . . . Once true information is disclosed in *public* court documents open to *public* inspection, the press cannot be sanctioned for publishing it.[65]

Because the Court specifically refrained from addressing the constitutionality of laws limiting access to hearings and records in juvenile proceedings,[66] such access, and precisely what is needed to ensure that a hearing is kept private, remain open questions. For example, if a judge admits one person into the juvenile courtroom for research purposes, is that proceeding then tantamount to a public hearing? Can a media representative ever be admitted into the courtroom and the proceeding still be considered private? Or does any access, although limited and discretionary, necessarily open the court-

---

nature of juvenile court proceedings.

61. OKLA. STAT. ANN. tit. 10, § 1111 (West Supp. 1979).

62. 420 U.S. 469 (1975).

63. 430 U.S. at 310.

64. The significance of *Pell* and *Saxbe* to the public/private distinction is that if the hearing is private there is no media access, hence no issue of publication.

65. 420 U.S. at 496 (emphasis added).

66. *Id.* at 496 n.26.

room to the public?

In *Smith v. Daily Mail Publishing Co.*,[67] the Court finally addressed the constitutionality of a state criminal statute that made it a crime for a newspaper to publish the name of a minor charged as a juvenile offender unless there was prior approval by the juvenile court. The relevant statute prohibited publication of the "name of any child, in connection with any proceedings under [the Child Welfare Chapter] . . . without written order of the court."[68] Two newspapers obtained the name of a juvenile, allegedly responsible for a shooting, from a police band radio and on-the-scene reporters. The initial newspaper account of the incident did not include the name of the suspected juvenile, but subsequent articles did. Shortly thereafter, a grand jury returned an indictment against the newspapers.

The Court's main concern was not with prior restraint, but rather the ability of the state to punish the offending newspaper after it had published the juvenile's name. Relying on the constitutional standards established in *Landmark Communications, Inc. v. Virginia*,[69] the Court in *Smith* found the criminal sanctions to be unconstitutional.[70]

Smith suggests a test whereby publication of truthful information that has been lawfully obtained may not be punished unless the state can show an interest of the "highest order."[71] Applying that test, the Court concluded that the state's interest in protecting the anonymity of juvenile offenders was not sufficient to justify criminal sanctions. Furthermore, the Court indicated a lack of evidence demonstrating that criminal sanctions were necessary to fulfill the state's interest in maintaining confidentiality in juvenile court

67. 443 U.S. 97 (1979).

68. W. VA. CODE § 49-7-3 (1976).

69. 435 U.S. 829 (1978).

70. 443 U.S. at 104-06. *Landmark Communications* rejected a "clear and present danger" test for determining the constitutional validity of criminal sanctions imposed for the publication of information obtained at confidential Judicial Inquiry and Review Commission hearings. The Court balanced the state's interests in preserving the confidentiality of Commission proceedings by the use of criminal sanctions against first amendment guarantees, and determined that the state's interests were insufficient to warrant the imposition of criminal sanctions. 435 U.S. at 841. The Court was not concerned with the issues of criminal sanctions for the publication of information unlawfully obtained or of Virginia's power to preserve confidentiality in its Commission hearings. *Id.* at 837.

71. 443 U.S. at 103-04.

proceedings.

The limited holding in *Smith* did not address the issue of *unlawful* press access to confidential judicial proceedings.[72] The name of the juvenile offender was lawfully obtained from a public source and the statute imposed criminal sanctions. The case should therefore be read narrowly. If access to confidential juvenile court proceedings is limited so as to exclude entry with the purpose or intent to disseminate juveniles' names, then some civil sanction might be imposed where the privilege of access is obtained fraudulently.

THE IMPORTANCE OF PUBLIC SCRUTINY

Although a juvenile has no constitutional right to a public trial,[73] the lack of such a right does not diminish the importance of public scrutiny in maintaining ethical and prudent judicial proceedings. The notion of a public trial has an important place in the history of this country. The Pennsylvania Constitution, Declaration of Rights,[74] and the North Carolina Constitution, Declaration of Rights,[75] were the first instruments in this country to guarantee the right to a public trial.

In 1791, the sixth amendment to the United States Constitution was ratified, ensuring that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[76] In 1948, the United States Supreme Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."[77] Secret trials, of course, are part of the history of suppression of divergent political and religious beliefs, most notably during the Spanish Inquisition,[78] in the practices of the English Court of Star Chamber,[79] and the

---

72. *Id.* at 105.

73. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

74. PA. CONST. of 1776, art. IX (current version at PA. CONST. art. 1, § 9).

75. N.C. CONST. of 1776, art. IX (current version at N.C. CONST. art. 1, § 23).

76. U.S. CONST. amend. VI. CAL. CONST. art. 1, § 15, also ensures a criminal defendant the right to a speedy and public trial.

77. *In re* Oliver, 333 U.S. 257, 266 (1948)(footnote omitted).

78. *See* A.L. MAYCOCK, THE INQUISITION FROM ITS ESTABLISHMENT TO THE GREAT SCHISM 145-64 (1927).

79. *See* Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 381, 386-89 (1931-1932).

French *lettre de cachet.*[80] The right to a public trial is a guarantee that the courts of justice will not be used to persecute, with public awareness and opinion serving as the effective check. A second, equally important consideration in guaranteeing a public trial for criminal cases is the right of a criminal defendant to have his case heard before the people.[81]

Public Scrutiny of Juvenile Courts in California

In California, juvenile court proceedings are not considered criminal in nature and, therefore, have been exempted from the constitutional requirement of a public trial for criminal cases.[82] When juvenile proceedings are not a matter of public record, the public has no corresponding right to know the identity of the minor accused of the delinquent act. In order to preserve confidentiality, the court must have discretion to exclude observers from the courtroom.

The justifiable aim of protecting a minor's identity, however, should not override the equally desirable goal of encouraging responsible reporting of the *process* of juvenile court proceedings. California's solution to this dilemma is to attempt a compromise between confidentiality for the juvenile and public scrutiny over the courts by permitting a *limited* amount of public review. The California Welfare and Institutions Code section 676 provides:

> Unless requested by the minor concerning whom the petition has been filed and any parent or guardian present, the public shall not be admitted to a juvenile court hearing. The judge or referee may nevertheless admit such persons as he deems to have a direct and legitimate interest in the particular case or the work of the court.[83]

The California Supreme Court recently interpreted the intent of the foregoing statute in addressing the issue of media access to juvenile fitness hearings. In *Brian W. v. Superior Court,*[84] decided in February 1978, the court concluded that

---

80. The *lettre de cachet* was an order of the King of France that one of his subjects be imprisoned or exiled without a trial or an opportunity to defend himself. *Id.* at 388.

81. U.S. CONST., amend. VI.

82. Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956).

83. CAL. WELF. & INST. CODE § 346 (West Supp. 1980).

84. 20 Cal.3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978).

> in vesting the judge with discretion to admit to juvenile court proceedings persons having a "direct and legitimate interest in the particular case or work of the court," it was the purpose of the Legislature to allow press attendance at juvenile hearings.[85]

Brian W. was a seventeen-year-old charged with murder and kidnapping for the purpose of robbery. Under California Welfare and Institutions Code section 707(b),[86] the district attorney sought a fitness hearing in order to have the minor bound over to adult court. The minor moved for a closed hearing and an order preventing court officers and witnesses from communicating with the press.[87]

The trial court ordered a closed hearing but permitted media representatives to attend the proceedings on the condition that the names of the minor and his parents not be disclosed. The petitioner challenged the ruling on the basis that press attendance was inconsistent with the confidential nature of the juvenile court as expressed in the California Welfare and Institutions Code, providing for a closed hearing.[88] Writing for the majority, Justice Mosk stated that press attendance at juvenile court proceedings would not frustrate the rehabilitative purpose of the juvenile court because the judge's exercise of control over any disclosure of the juvenile's identity would preserve confidentiality.[89]

Although *Brian W.* permitted media access to juvenile court proceedings, there is every indication that the supreme court's intention was to keep the proceedings private.[90] In fact, although there is no reason that media access and confidentiality for the juvenile need conflict, some additional protection is required to ensure that once a member of the public

---

85. *Id.* at 623, 574 P.2d at 791, 143 Cal. Rptr. at 720.

86. CAL. WELF. & INST. CODE § 707(b) (Deering 1979) (current version at § 707(b)(West Supp. 1980)) provided in relevant part:

> In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he was 16 years of age or older, of one of the following offenses:
>
> (1) Murder; . . .
>
> (6) Kidnapping for purpose of robbery; . . . [the court shall upon motion of the petitioner] . . . find that the minor is not a fit and proper subject to be dealt with under the juvenile court law . . . .

87. 20 Cal. 3d at 620-21, 574 P.2d at 789, 143 Cal. Rptr. at 718.

88. CAL. WELF. & INST. CODE § 346 (West Supp. 1980).

89. 20 Cal. 3d at 623, 574 P.2d at 791, 143 Cal. Rptr. at 720.

90. *Id.* at 622, 574 P.2d at 790, 143 Cal. Rptr. at 719.

is allowed into the courtroom, the minor's name is not allowed to be released.

Proposed—A Contract to Allow Public Scrutiny and Preserve Confidentiality

One solution to the media access/confidentiality dilemma may be found in the law of contract—that is, the law could require a contract between the judge or the court and individual observers, be they members of the news media or the general public. Such a contract would apply in courtrooms to which the general public has a limited right of access, for example, the juvenile courts of California. A model contract might provide:

> I, _ _ , understand that juvenile court proceedings are generally closed to the public and that there is no public right to know of the events that occur in juvenile court proceedings. The law of this state provides that the judge or referee *may* admit persons as (s)he *deems to have a direct and legitimate interest in the particular case or the work of the court.*
>
> The judge or referee, in his/her discretion, has determined that dissemination of the identities of minors and their families, or any witness called before this court (including names, photographs, addresses, and other identifying information) is not a lawful purpose for which access to this court is being granted. Entrance to this court with the purpose or intent of disseminating the identities of the parties constitutes a fraud on the court.
>
> The judge or referee understands that in permitting _ _ to observe this proceeding, the facts other than identities of the persons present may be made public.
>
> I understand that I am being granted a privilege to observe this court function, and that this privilege may be lost if I breach any of the conditions of my entry:
>
> 1. Identities of the parties and witnesses before the court, and their families, shall not be disseminated publicly, including names, photographs, addresses, and other identifying information.
> 2. I will at all times maintain proper courtroom conduct and obey directions of the judge, referee, bailiff, or clerk.
>
> In the event this contract is breached and harm results, the injured party is entitled to bring an action for damages. For purposes of relief, injured parties may include parties before the court, witnesses, and the families

of both witnesses and parties. No legal relief is created for pain and suffering or loss of reputation in the community.

The statute of limitations shall run until five (5) years after the minor has reached the age of majority, or eight (8) years after the damaging publication, whichever is longer.

The terms of this contract shall be made applicable each time I enter this court during the period _____ - _____.

Signature of Observer	Signature of Judge (or Referee, Clerk, etc.)
Date	Date

The benefits of such a contract are best understood with an illustration. Assume that a delinquency petition is sustained on a sixteen-year-old. When he turns eighteen, his records are sealed. Subsequent to having his records sealed, the individual seeks employment and is asked by a prospective employer, "Have you ever been convicted of a crime?" Answering "no," the individual is hired. If the minor's identity was made public at the time his petition was sustained, however, and the prospective employer knows of the delinquent behavior and refuses to hire the individual on the basis of that behavior, the record sealing is of no effect; publication of identity clearly contravenes the intent of statutory and case law provisions for record sealing. The contract discussed above would provide a potential remedy.

It must be pointed out that it is highly unlikely that any state could contract with private individuals in a way that amounted to contracting away a constitutional right.[91] In our context, if the public had a right to know of the events in a juvenile hearing, the proposed contract would be an unconstitutional prior restraint. But no such right of access exists re-

91. *See* United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), in which the government, in its capacity as an employer, entered into a "Secrecy Agreement" with an employee of the Central Intelligence Agency. Upon that employee's termination of service with the Central Intelligence Agency, a "Secrecy Oath" was entered into by Mr. Marchetti and the government. Both the Agreement and the Oath prohibited the disclosure of information relating to national defense and security. *Id.* at 1312. The court determined that while Marchetti might be constitutionally restrained from divulging classified information, the Secrecy Oath which purported to prevent disclosure of both classified and unclassified information could not be enforced. *Id.* at 1315.

garding "closed" juvenile proceedings. A judge may exclude all observers from juvenile hearings, and thereby preclude the dissemination of *any* information relating to those proceedings. Under California's limited access statute, when observers, including the media, are allowed into the courtroom, the judge does not say, "This is now a public hearing." Rather, the judge is permitting the presence of individuals who will satisfy some "legitimate or direct" concern; publication of identities is not a legitimate concern.[92] It is also important to note that the restraint envisioned here is *de minimis*. The only information walled off from widespread public disclosure is the identities of persons involved in the court action.

A contract such as the one proposed above would provide a valuable tool for protecting a juvenile offender's identity, yet ease the access to juvenile hearings for the purposes of research and study. The hazards inherent in any unwritten understanding regarding the confidential nature of the proceedings between a judge and a news representative or private individual are avoided. Moreover, the contract would provide not only a legal prohibition against the dissemination of identities, but also a cause of action for damages arising out of any unlawful disclosure. Finally, no "gray area" remains regarding what information may or may not be disseminated. *No* information that would identify any of the individuals involved in the litigation could be disseminated.

CONCLUSION

The problem of confidentiality of juvenile court proceedings requires some immediate attention. *Oklahoma Publishing Co.* has brought to light the issue of the strength of an agreement between a judge and a reporter in maintaining the confidentiality of a delinquent's identity. The California Supreme Court, without adequately dealing with the ramifications of *Oklahoma Publishing Co.*, permitted media access to the fitness portion of juvenile hearings, supposedly leaving the confidentiality intact, "as the judge can exercise control over disclosure of the juvenile's identity."[93] It was recognized in

92. For example, if an individual requested admission to a juvenile court for the purpose of publishing a list of juvenile offenders, the request could, and should, be denied.

93. Brian W. v. Superior Court, 20 Cal. 3d at 623, 574 P.2d at 791, 143 Cal.

Brian W. that the Oklahoma juvenile court's hearings were, *in fact,* held to be open,[94] but the California court failed to note that Oklahoma law provided for closed juvenile hearings.[95] There is nothing in the law to prevent a determination that the presence of a newsperson or a private individual at a juvenile court hearing makes that hearing *in fact* public, preventing a judge from exercising control over the disclosure of juveniles' identities. In the interest of maintaining confidentiality in juvenile courts while upholding the integrity of the judicial process through public monitoring, a legally binding alternative, such as the contract proposed herein, should be adopted.

Rptr. at 720 (footnote omitted).

94. *Id.* at 626 n.6, 574 P.2d at 791 n.6, 143 Cal. Rptr. 720 n.6.

95. *See* text accompanying note 61, *supra.*